IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.
NOTICE OF MOTION NO.4063 OF 2007
IN
ARBITRATION PETITION NO.195 OF 2007

Suresh Sitaram Keer and another ..Petitioners.
Vs.
M/s. Empire Builders & Developers
& Others ..Respondents.

.....

Ms. Chandana Salgaocar-Radia for the Petitioners.
Mr. G.S. Bhat for Respondent Nos.1 to 4.
Mr. R. Sattardekar i/b M/s. D.J. Kamdin & Co. for Respondent No.6.

.....

CORAM: **DR. D.Y. CHANDRACHUD, J.**
14th December, 2007.

P.C. :

1. The Notice of Motion has been taken out in pursuance of liberty granted in the order of the Learned Single Judge, Hon'ble Mr. Justice S.C. Dharmadhikari dated 6th August, 2007.

2. The disputes between the parties arise out of a development agreement dated 5th February, 2003 between the Petitioners and Respondent No.6 on the one hand and Respondent Nos.1 to 5. The Petitioners and Respondent No.6 are owners of a plot of land situated at Gopi Tank Road, Upper Mahim. By a development agreement dated 5th February, 2003 the owners

granted permission to the developer to develop the property on certain terms and conditions. By a supplementary agreement dated 6th February, 2003 the developer agreed to allot to the owners and their families 7 flats, 3 shops with a separate common toilet facility and 7 car parking spaces on ownership basis. The developer had also agreed to provide a separate terrace and a separate and exclusive lift as was provided to the flat purchasers in the saleable component. It was agreed that any increase in the FSI or TDR of the property will be equally apportioned between the owners and developers. Seven agreements for permanent alternate accommodation and three separate agreements in respect of three shops were executed on 6th February, 2003. Subsequently, on 22nd December, 2003 a supplementary agreement was entered into by which the developer undertook not to use any TDR without the prior written consent of the owners and without making payment of 50% of the market price to the owners.

3. The arbitration petition under Section 9 of the Arbitration and Conciliation Act 1996 came to be instituted on an allegation that there was a breach of the provisions of the development

agreement. Parties are governed by a provision for arbitration.

4. On 27th July, 2007 a statement was made before the Learned Single Judge that without prejudice to the rights and contentions of both the sides the developer is ready and willing to furnish an undertaking to this Court that in addition to the entitlement of the Petitioners of three shops, seven flats, a terrace area, common areas and three car parking spaces, the portion between the Second and the eighth floor would not be sold, alienated or encumbered nor would there be a parting of possession. Time was, however, granted by the Court on the request of counsel appearing for the developer to place the undertaking on affidavit.

5. In pursuance of the order of the Court, the developer filed an undertaking in an affidavit dated 31st July, 1007. The affidavit of the developer which was filed by the Second Respondent stated as follows in paragraph 6:

> "6. I say that we have entered into 3 separate agreements all dated 23rd May 2007 with the said 3 persons as under and have agreed to allot flats in the hollow portion of the building under construction as under :

i] Flat No.301 to Dyandeo Shridhar Sawant under registered Agreement bearing Sr. No. DEE-2464.

ii] Flat No.401 to Jaisingh Laxman Chavan under registered Agreement bearing Sr. No.4647 of 2007.

iii] Flat No.501 to Rajendra Atmaram Chavan under registered Agreement bearing No.DBE 4648 of 2007."

6. In view of this affidavit a further order was passed by the Court on 6th August, 2007 recording that the aforesaid three flats had been undertaken by the developer to be offered to project affected persons. In paragraph 6 of the order, the Learned Single Judge observed thus :

> "The project affected persons have already been offered the flats inasmuch as the Agreements have been entered into with them and registered in accordance with law. He states that the moment, the flats are ready for occupation by these project affected persons, they would be offered to them and none else. He states that, copies of the letters/ documents handing over and confirming the possession of these flats would be handed over to the petitioners' Advocate within a period of one week from the date of their execution."

The Arbitration Petition was accordingly made absolute with the following directions :

> "7. Accordingly, the arbitration petition stands

disposed of by making following interim measures, which are without prejudice to the rights and contentions of both sides :

a) The developer shall not in any manner, alienate, encumber, transfer or part with three shops, seven flats, terrace area and common areas and seven car parking spaces. Mr. Bhat states that this is the entitlement of the petitioners and respondent No.6. Each of these shops and flats, after being ready for occupation, would be kept vacant and not handed over in the manner more particularly set out above till the decision by the arbitral tribunal, inasmuch as they will not be sold and/or transferred in the name of third party.

b) Similarly, two flats on the 6th and 7th floor, which have been referred to in the foregoing paragraphs would also not be alienated, encumbered, transferred or their possession parted with in any manner till the conclusion of the arbitral proceedings."

7. The Advocate for the developer also stated that the details of the car parking spaces available for occupation by other purchasers would be provided to the Petitioners' advocate within ten days from the grant of the occupation certificate. In paragraph 10 of the order a further statement of the advocate for the developer was recorded in the following terms :

"10. Mr. Bhat, after taking instructions from the respondent No.3 states that 3 flats would be handed over to the project affected persons themselves and as of today there is no authorization in favour of the developers enabling them to dispose of these flats in open market."

Finally, in the order dated 6th August, 2007 this Court recorded that parties are agreed to the appointment of Mr. Justice S.C. Pratap as sole arbitrator. The Notice of Motion has been instituted in pursuance of the liberty granted in the order dated 6th August, 2007 for variation of the order.

8. The grievance of the Petitioners is that a solemn statement was made before this Court on affidavit on 31st July, 2007 that three separate agreements dated 23rd May, 2007 had been entered into in respect of flats 301, 401 and 501. The Petitioners have now placed on the record agreements entered into by the developer with each of these three project affected persons by which there was a reassignment of the right, title and interest in favour of the developer. These agreements were entered into on 24th May, 2007.

9. There is merit in the submission which has been urged on behalf of the Petitioners that the affidavit which was filed before this Court on 31st July, 2007 was manifestly false since it was to the knowledge of the developer when he filed the affidavit that he had already obtained an assignment of flats 301, 401 and 501 from the

three project affected persons. The agreements were not disclosed before the Court in the affidavit and in fact a statement was made on the instructions of the developer that the flats would be allotted to the project affected persons themselves. In the affidavit which has been filed in reply to the Motion the developer has not disputed that by the three agreements he had obtained assignment of the flats in his favour on 24th May, 2007. This shows the brazen manner in which the developer has acted in defiance of the proceedings before the Court by making a statement which was false to his own knowledge. The developer has stated in his affidavit that by an agreement dated 1st August, 2007 he had in fact assigned flat 401 to one Rajan Naik and Rutuja Naik. This compounds the situation because even this circumstance was not disclosed to the Court, when the Arbitration Petition came up for hearing on 6th August, 2007. The feeble explanation which is offered is that the Court was crowded and the developer "could not understand quickly regarding the nature of the status and authorization". The developer claims that he was confused and stated that the flats would be offered to the project affected persons although they had already assigned their right, title and interest in favour of the developer. In my view, it is apparent that a

brazen and deliberate attempt has been made to mislead the Court and to make a representation which to the knowledge of the developer was false. Prima facie, the developer is liable to be proceeded with in the exercise of the contempt jurisdiction. In the **UP Residents Employees Co-operative House Building Society v. New Okhla Industrial Development Authority**[1], the Supreme Court made a reference to the legal position that a filing of a false affidavit would amount to a contempt of Court.

10. The aspect of the contempt jurisdiction would be dealt with subsequently. At this stage, the relief that has been sought in the Notice of Motion is to the effect that the developer be restrained from creating any third party rights of any nature whatsoever in respect of flats 301, 401 and 501 and that he should be injuncted from parting with the possession of any of the 17 flats until possession is first given to the Petitioners. The development agreement between the parties postulates in Clause 13 that the developer shall not put any other person in possession until the owners have been put into possession of their respective premises. At the present stage, it has been stated on behalf of the developer

1 (2004) 9 SCC 670.

that (i) In addition to observing the directions contained in paragraphs 5 and 7 of the order dated 6th August, 2007 the developer shall not alienate or part with the possession of or encumber flat Nos.301 and 501; (ii) that an amount of Rs.6 lacs which has been received on account of the sale of flat No.401 shall be deposited with the Prothonotary and Senior Master within a period of one week from today and any further amounts that may be received under the agreement shall be deposited in the same manner; (iii) no third party would be placed in possession of the premises (save and except for the four persons who have been allowed to furnish their premises as set out in paragraph 19 of the affidavit dated 29th June, 2007) and (iv) the arrears that are payable on account of the alternative accommodation to the owners i.e. Petitioners and Respondent No.6 shall be paid within a period of one week from today and that the compensation as required by the agreement shall be continued to be paid on or before the seventh day of every succeeding month until vacant and peaceful possession of the premises is handed over in terms of the agreement.

11. One of the submissions urged on behalf of the developer

is that the construction that was required to be carried out in lieu of the contravening structures and for the project affected persons cannot be carried out in view of the objections which have been taken by the Petitioners and Respondent No.6. The Petitioners and Respondent No.6 are before the Court and state that they would withdraw their objections forthwith subject to the condition that the developer agrees to placing them in possession of the premises within a period of 48 hours of the receipt of the occupation certificate. The developer has accepted the aforesaid condition and the assurances of the parties in these terms are accordingly recorded.

12. The parties are now expected to abide by the statements which are made in the aforesaid terms.

13. The amount deposited by the developer in terms of the statement made herein above shall be invested by the Prothonotary and Senior Master and shall abide by the result of the arbitral proceedings. In addition, it has been stated that the purchaser of flat No.702 has been allowed to furnish the accommodation.

14. The Notice of Motion shall accordingly stand disposed of.

15. Prima facie Respondent No.2 has filed a false affidavit before the Court for the reasons already indicated in the earlier part of this order. Respondents 1 to 5 on whose behalf the affidavits are filed are accordingly liable to be proceeded with in the exercise of the contempt jurisdiction of this Court. Notice to show cause shall accordingly be issued to Respondents 1 to 5 as to why proceedings be not adopted under the Contempt of Courts Act, 1971, returnable after six weeks.